MBF FACTORS SDN BHD

v.

KEH HUA T/A JAG TRADING

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[CIVIL APPEAL NO: R1-12-462-2002]
2 SEPTEMBER 2003

CIVIL PROCEDURE: *Appeal - Appeal to High Court - Whether plaintiff had right of appeal - Whether dismissal of an application under O. 26A Subordinate Courts Rules 1980 within meaning of 'decision' in s. 3 Courts of Judicature Act 1964 - Whether denying plaintiff right of appeal contradicted principle of equity under art. 8(1) Federal Constitution*

CIVIL PROCEDURE: *Pleadings - Statement of claim - Claim for debt due - Whether necessary to plead particulars of all outstanding individual invoices - Whether particulars given in statement of claim sufficient - Subordinate Courts Rules 1980, O. 14 r. 13*

CIVIL PROCEDURE: *Summary judgment - Application for - Whether there were triable issues - Whether a full trial necessary*

This was an appeal by the plaintiff against the decision of the sessions judge dismissing its application for summary judgment under O. 26A of the Subordinate Courts Rules 1980 ('SCR'). The plaintiff, being the statutory assignee of the book debts of one Pan Designer Sdn Bhd ('the assignor'), had earlier applied for summary judgment against the defendant for book debts due and owing by the defendant to the assignor. At the appeal, the defendant raised the preliminary objection that the plaintiff had no right of appeal because the dismissal of the plaintiff's summary judgment application under O. 26A of the SCR was not a final order but rather a 'ruling' as opposed to a decision within the meaning of 'decision' in s. 3 of the Courts of Judicature Act 1964 ('CJA'). The defendant also contended that the plaintiff had failed to plead material facts to support the plaintiff's claim, and that any omission in the statement of claim could not be made good through affidavits.

Held:

[1] The dismissal of an O. 26A SCR application certainly comes within the meaning of the word "decision" in s. 3 of the CJA as it can only be made after considering the application in question, the affidavits in support and in opposition, the documentary exhibits, the pleadings and all the relevant materials in the file. Surely, it is not a 'ruling' made in the course of a trial or hearing of any cause or matter. Moreover, to deny a plaintiff the right of appeal will create an unequal situation, whereby a decision allowing an O. 26A application is appealable, while a decision dismissing it is not appealable. This would be against the principle of equality enshrined under art. 8(1) of the Federal Constitution. For this reason, the defendant's preliminary objection was dismissed. (pp 412 f-h & 413 a)

[2] Order 14 r. 13 of the SCR clearly states that "every pleading must contain, and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence as the case may be, **but not by evidence by which those facts are to be proved,** … ". There was no necessity to plead the particulars of all outstanding individual invoices as they constituted evidence of the indebtedness of the claimant. Thus, in this instance, the particulars given in the statement of claim were sufficient. (p 414 d-e)

[3] In the present case, the defendant had raised several issues; however, they were not triable. Therefore, there was no necessity for this case to proceed through the rigmarole of a full trial. (p 416 b)

[Plaintiff's appeal allowed; summary judgment entered against defendant for sum claimed.]

Case(s) referred to:

Alexander John Shek Kwok Bun v. WAB Keluarga Realty Sdn Bhd [2002] 1 CLJ 480 HC ***(refd)***

Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627; [1992] 1 CLJ 14 SC ***(foll)***

Bank of Commerce (M) Bhd v. Tan Boon Soon t/a Messrs Syarikat Soon Tatt Trading & Anor [1995] 1 CLJ 69 ***(dist)***

Kee Yeh Maritime Co Ltd v. Coastal Shipping Sdn Bhd [2001] 5 CLJ 194 HC ***(refd)***

Sitrac Corp Sdn Bhd v. Lim Siew Eng [2002] 4 CLJ 463 HC ***(refd)***

Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd [2003] 2 CLJ 177 CA ***(refd)***

United Malayan Banking Corporation Bhd v. Palm & Vegetable Oils (M) Sdn Bhd [1983] 1 MLJ 206 ***(dist)***

Legislation referred to:
Court of Judicature Act 1964, s. 3
Federal Constitution, art. 8(1)
Subordinate Courts Rules 1980, O. 14 r. 13, O. 26A

Other source(s) referred to:
Peter M Biscoe, *The Law and Practice of Credit Factoring*, pp 100-101

For the appellant - Kingston Tan; M/s Heiley Hassan, Tan & Partners
For the respondent - LH Chua; M/s LH Chua

Reported by Gan Peng Chiang

JUDGMENT

Raus Sharif J:

Appeal
This is an appeal by the appellant (plaintiff) against the decision of the learned Sessions Court Judge who had, on 25 June 2002, dismissed with costs the plaintiff's application for summary judgment under O. 26A of the Subordinate Courts Rules 1980 (Order 26A).

Facts
On 4 April 2001, the plaintiff being the statutory assignee of book debts of Pan Designer Sdn. Bhd. (the said assignor), *via* a factoring agreement dated 21 April 1992 filed an action against the respondent (defendant) *vide* Sessions Court Case No. 5-52-3053-2001. The amount claimed was RM155,381.29 with interest and costs being the book debts due and owing by the defendant to the supplier whom was the said assignor. On 28 September 2001, the plaintiff filed the notice of application for summary judgment against the defendant for the said sum. On 25 June 2002, the learned Sessions Court Judge dismissed the plaintiff's application with costs.

Preliminary Objection
Before this court, the learned counsel for the defendant, raised a preliminary objection to the effect that the plaintiff has no right of appeal. This is because, the dismissal of the plaintiff's summary judgement application under O. 26A against the defendant is not a final order but rather a 'ruling' as opposed to a decision within the meaning of 'decision' in s. 3 of the Court of Judicature Act 1964 (CJA). According to learned counsel, the order of the learned Sessions Court Judge does not finally dispose the rights of the plaintiff and as such, there cannot be any appeal against the said order.

Thus, the preliminary issue for determination is whether an order of dismissal under O. 26A application is appealable. Zakaria Sam JC in *Alexander John Shek Kwok Bun v. WAB Keluarga Realty Sdn. Bhd.* [2002] 1 CLJ 480 held that a dismissal of O. 26A did not fall within the meaning of 'decision' under s. 3 of CJA. In *Kee Yeh Maritime Co. Ltd. v. Coastal Shipping Sdn. Bhd.* [2001] 5 CLJ 194, Richard Malanjum J (now JCA) held that the plaintiff's application to strike out the defence and granting the defendant leave to defend was only an interlocutory order and consequently not a 'decision' as defined by s. 3, hence it was not appealable. However, in *Sitrac Corp. Sdn. Bhd. v. Lim Siew Eng* [2002] 4 CLJ 463 Abdul Aziz J (now JCA) decided differently. The question concerning this case was whether or not the decision to dismiss the appellants' application to strike out the plaintiffs' summons and statement of claim was appealable. Abdul Aziz J in answering that such decision is appealable declined to follow the judgement of Richard Malanjum J, due to the fact that Richard Malanjum J, was not, or did not feel, called upon to consider the words 'ruling made in the course of a trial or hearing of any cause or matter'. The Court of Appeal in *Syarikat Tingan Lumber Sdn. Bhd. v. Takang Timber Sdn. Bhd.* [2003] 2 CLJ 177, laid down the applicable principle at p. 185 as follows:

> ... what must be asked, is not only whether a ruling does not dispose the final rights of the parties but also the question whether it was a ruling made in the course of a trial or hearing, of any cause or matter. If it was not a ruling made in the course of a trial or matter, regardless of the fact that it did not dispose of the rights of the parties, it may not be excluded by the definition of 'decision' as provided in s. 3 of the CJA as amended, and is therefore, appealable.

It is clear to me that a dismissal of an O. 26A is certainly within the meaning of the word "decision" in s. 3 of CJA. This is because a dismissal of an O. 26A application can only be made after considering the application in question, the affidavits in support and in opposition, documentary exhibits, pleadings and all the relevant materials in the file. Surely it is not a ruling made in the course of a trial or hearing of any cause or matter. Moreover, to deny the plaintiff the right to appeal would create an unequal situation, whereby a decision allowing an O. 26A application is appealable, while a decision dismissing it is not appealable. This would be against the principle of equality as provided by art. 8(1) of the Federal Constitution which provide as follows:

> All persons are equal before the law and entitled to equal protection of the law.

Thus, to me, when a summary judgment given in favour of the plaintiff would give the defendant the right of appeal, the dismissal of the plaintiff's application must also give the plaintiff an equal right of appeal. For the aforesaid reasons, the defendant's preliminary objection was dismissed. Accordingly, I proceeded to hear the arguments on the merits of the appeal.

Order 26A Application

As stated earlier, the plaintiff is the statutory assignee of book debts of Pan Designer Sdn. Bhd. ("the assignor"). The plaintiff and the assignor had entered into a factoring agreement dated 21 April 1992 for the sale and purchase of book debts. The defendant is the said assignor's customer, where the assignor's book debts of RM155,381.29 were assigned to the plaintiff. Thus, the plaintiff's cause of action against the defendant is under the law of assignment of book debts absolutely assigned to the plaintiff by the said assignor.

It is the submission of the plaintiff although the defendant may not be privy to the factoring agreement, the defendant's liability to pay the plaintiff arises upon receipt of the notice of assignment, *viz*:

(a) the assignor's letter of notification dated 15 December 1995, duly acknowledged receipt by the defendant.

(b) the plaintiff's legend stamped on the invoices and delivery orders as early as 3 November 1995 and duly acknowledged receipt by the defendant in the delivery orders; and

(c) clause on each of the plaintiff's statement of account since 18 December 1995 sent to the defendant.

The letter of notification as duly acknowledged receipt by the defendant provides *inter alia*, that:

> Any objection to any invoices or its terms must be reported to MBf Factors Sdn. Bhd. within 14 days in writing after receipt of such invoices.

The defendant received the invoices therewith stamped with the plaintiff's legend which provides, *inter alia*, that:

> Any objection to this bill or its terms must be reported to them within 14 days after receipt of this bill.

The plaintiff's monthly statements of accounts received by the defendant, contained a clause which provides, *inter alia*, that:

> The figures as shown in this statement shall be deemed correct unless any objection and/or discrepancy therein is reported to MBf Factors Sdn. Bhd. in writing within 14 days from the date of the invoice concerned.

Thus, it is the submission of the plaintiff that the defendant did not raise any objection within 14 days upon receipt thereof. Therefore, the defendant is estopped from denying that the plaintiff is its lawful creditor and the validity of the plaintiff's claim and the plaintiff's right to claim the same. To the plaintiff, this is a fit and proper case for a summary judgment.

The first issue raised by the defendant to deny the plaintiff for a summary judgment was that the plaintiff had failed to plead material facts to support the plaintiff's claim for RM155,381.29 as at 16 May 1997. According to the defendant any omission in the statement of claim cannot be made good by affidavit. The defendant relied on two cases namely *United Malayan Banking Corporation Bhd. v. Palm & Vegetable Oils (M) Sdn. Bhd.* [1983] 1 MLJ 206 and *Bank of Commerce (M) Bhd. v. Tan Boon Soon* [1995] 1 CLJ 69.

I am, with respect, unable to agree. Order 14 r. 13 of the Subordinate Courts Rules 1980 clearly state that "every pleading must contain, and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence as the case may be, but not evidence by which those facts are to be proved, ...". To me, there is no necessity to plead the particulars of all outstanding individual invoices as these are evidence of the indebtedness of the defendant. Thus, I am of the view the particulars given in the statement of claim are sufficient. The present case can be distinguished from the two cases submitted by the defendant. In the *United Malayan Banking Corporation*'s case *(supra)*, the failure to disclose were shares pledged as security. In addition the amount claimed was of differing sums in the statement of claim and the summary judgment application, that is RM8,540,846.34 and RM3,490,113.26 respectively. In the *Bank of Commerce (M) Berhad*'s case *(supra)*, again it dealt with a failure to disclose, *inter alia*, building and land pledged as securities. In the said case, the realization of the securities pledged was for an unknown sum which resulted in an uncertainty as to how the ultimate outstanding amount came to arrive. This is not the position in the present case.

In any event, even if the defendant's submission is to be taken seriously, the defendant in this case, for instance, was neither prejudiced nor confused by an absence of the individual invoices in the statement of claim. Firstly, the plaintiff has pleaded the same outstanding amount of RM155,381.29 in the statement of claim and its summary judgment application and has had its statements of accounts annexed as an exhibit of the evidence of indebtedness thereof *vide*

30 invoices and delivery orders to support the plaintiff's claim for RM155,381.29. Secondly, the same outstanding amount was also reflected in the plaintiff's monthly statements of accounts from 16 May 1997 to 31 January 2001, wherein no objection or dispute in writing has ever been made by the defendant.

The second issue raised by the defendant was that the plaintiff had failed to take into consideration the payment of RM38,363.50 by the defendant to the plaintiff. The plaintiff replied that the sum of RM38,363.50 paid by the defendant to the plaintiff had in fact been taken into account by the plaintiff. According to the plaintiff the payment was made to fully settle seven invoices as reflected in the plaintiff's statement of account dated 18 December 1995 which show the same and exact balance of RM38,363.50. According to the plaintiff, in view of the defendant's account with the plaintiff is a running account, these seven settled invoices which no longer form the subject matter of plaintiff s claim would no longer be reflected in any of the plaintiff's statements of accounts henceforth.

I accept the plaintiff's explanation that the RM38,363.50 had been taken into account as shown in the documents exhibited by the plaintiff. In any event, I am of the view that the principle of estoppel should be applied against the defendant as the defendant had never at any material time raised any objection nor dispute on the accuracy of the plaintiff's monthly statements of accounts.

The third and final issue raised by the defendant is that the signature of the defendant in the assignor's letter of notification dated 15 December 1995, is not that of the defendant's. I am of the view that the defendant's allegation here is not *bona fide* but a mere afterthought. This is because the defendant duly acknowledged receipt 34 of the assignor's delivery orders containing the plaintiff's legend. As such, the defendant cannot now resile and dispute receipt of the notice of assignment *vide inter alia* the plaintiff's legends and statements of accounts from day one. Peter M. Biscoe 1975 Edition in his book *The Law and Practice of Credit Factoring* at p. 100-101 stated the law as follows:

> The principal method used in factoring to give notice of assignment is by printing, typing, stamping or sticking it (the Legend) on the invoice ... As an additional precaution, notice of assignment may also be contained on statements of accounts sent to the customer by the factor.

In any event, the conduct of the defendant in making two direct part-payments to the plaintiff *vide* OCBC cheque and cash clearly militates and negates the defendant's defence.

It has been said by the Federal Court in *Bank Negara Malaysia v. Mohd. Ismail & Ors.* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 that in an application for summary judgment, "the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable". No doubt in the present case, the defendant has raised several issues but the issues raised are not triable. Therefore, there is no necessity for this case to proceed through the rigmarole of a full trial.

Accordingly, I allowed the plaintiff's appeal with costs here and below and entered a summary judgment against the defendant for the sum claimed by the plaintiff.